Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

TERRY STEPHEN,

Petitioner,

vs.

VIRGINIA ROSE HUCKABA,
as Independent Administrator of the
Estate of ROBERT POWERS, JR.,

Respondent.

On Writ of Certiorari to the
Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Where the Order of the Trial Court entered on June 26, 1997, Appendix, A14-15. (The Order which the Appellate Court based it's Opinion on, entered on 11/9/2005), recited: "Par. 3. That this matter is brought pursuant to Section 20-4 of the Probate Act of the State of Illinois," (which is 755 ILCS/20-4) and where the following sections of the same Statute, Section 20-5(B) and (C), (755 ILCS 5/20-5(B) and (C)) provided that (B): "all persons holding liens against or having an interest in the real estate, or in the oil, gas, coal, or other mineral interest, or in any part thereof, described in the Petition in possession or otherwise whose rights are sought to be affected by the orders . . . shall be made parties-defendant, and, (C): "Upon the filing of the Petition, process shall be issued, served and returned as in other civil cases,

(1) Can the Appellate court by it's Opinion, where Stephen was not made a party-defendant to the proceeding which resulted in the Order filed on June 26, 1997, and was not served with Summons or otherwise entered his appearance therein, although the applicable statute required he joined as a party-defendant, be denied his property rights under a contract to purchase real estate from the estate without violating the 14th Amendment to the Constitution of the United States guaranteeing him that he would not be denied his property without due process of law? and,

(2) Where the Illinois Statute governing Lis Pendens provides that it does not apply to any party who is not given notice by service of Summons or by publication within six months after the Lis Pendens is filed (735 ILCS 5/2-1901), has the Appellate court by it's decision created an unreasonable classification between owners of interests in real estate with actual knowledge of the proceeding and owners of interest in real estate with constructive knowl-

edge of the proceeding under the Lis Pendens Act and therefore denied the Petitioner his property rights, under it's opinion of November 9, 2005 in violation of his rights to equal protection of the law guaranteed to him by the 14th Amendment to the United States Construction?

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NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2006

TERRY STEPHEN,

Petitioner,

-vs-

VIRGINIA ROSE HUCKABA, as
Independent Administrator of the
Estate of ROBERT POWERS, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

TO: THE HONORABLE JOHN G. ROBERTS, JR., THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

TERRY STEPHEN, the Petitioner herein, prays that a Writ of Certiorari to review the Judgment of the Appellate Court for the Fourth Appellate District of the State of Illinois, entered in the above-entitled case on November 9, 2005, be issued by this Court.

OPINIONS BELOW

The Opinion of the Appellate court of the Fourth Appellate District of the State of Illinois is reported at 361 Ill. App. 3 1047, 838 NE2 347 and 297 Ill. Dec. 860, and is printed in Appendix A, pp. A1-11. The judgment of the Circuit Court of Cumberland County, Illinois (the Trial Court) is printed in Appendix A, pp. A12-13. (The judgment appealed from) The Order entered by the Trial Court on June 26, 1997 is printed in Appendix A, pp. A14-15. (The Order of the Trial Court which the Appellate court based it's Opinion on).

JURISDICTION

The judgment of the Appellate court of the Fourth Appellate District of the State of Illinois (Appendix A, pp. A1-11) was entered on November 9, 2005. A timely Petition for Rehearing was filed on November 29, 2005, Appendix, pp. A18-32 and was denied on December 5, 2005, Appendix, p. A16. A Petition for Leave to Appeal to the Supreme Court of Illinois was filed in the Supreme Court of Illinois on December 19, 2005 and was denied by the Supreme Court of Illinois on April 19, 2006, Appendix, p. A17. The jurisdiction of this Court is involved under the provisions of Rule 10(b) and (c) of the Supreme Court of the United States Rules. (Substantive provisions) and Rule 13(1) of the Rules of the United States Supreme Court (Time provisions).

STATUTES INVOLVED

755 ILCS 5/20-4. Sale or mortgage of decedent's real estate.

(a) By leave of court and upon such terms as the court directs, a representative of a decedent's estate may sell or mortgage any real estate or interest therein to which the

decedent had claim or title, including the oil, gas, coal or other mineral interest therein, when it is necessary for the proper administration of the decedent's estate.

(b) Real estate specifically bequeathed or directed by the testator not to be sold may not be sold or mortgaged unless necessary for the payment of claims, expenses of administration or estate or inheritance taxes or the proper distribution of the estate.

755 ILCS 5/20-5. Procedure for sale or mortgage of real estate

(a) Before selling or mortgaging real estate, the representative shall file a petition in the court which issued his letters setting forth the facts and circumstances upon which it is founded, a description of the real estate or interest therein, or of the oil, gas, coal or other mineral interest involved, the approximate value thereof, the interest of the ward or decedent therein, and the nature and extent of all liens upon and other interests, if any, in the real estate, or in the oil, gas, coal or other mineral interest so far as they may be known to the petitioner. A copy of the proposed mortgage or of the proposed contract for sale of the real estate, if any, shall be attached to the petition.

(b) All persons holding liens against or having an interest in the real estate, or in the oil, gas, coal or other mineral interest or in any part thereof, described in the petition, in possession or otherwise, whose rights are sought to be affected by the order, except the ward shall be made parties defendant.

(c) Upon the filing of the petition, process shall be issued, served and returned as in other civil cases.

735 ILCS 5/2-1901. Lis pendens—Operative date of notice

§ 2-1901. Lis Pendens—Operative date of notice. Except as otherwise provided in Section 15-1503, every condemnation proceeding, proceeding to sell real estate of decedent to pay debts, or other action seeking equitable relief, affecting or involving real property shall, from the time of the filing in the office of the recorder in the county where the real estate is located, of a notice signed by any party to the action or his attorney of record or attorney in fact, on his or her behalf, setting forth the title of the action, the parties to it, the court where it was brought and a description of the real estate, be constructive notice to every person subsequently acquiring an interest in or a lien on the property affected thereby, and every such person and every person acquiring an interest or lien as above stated, not in possession of the property and whose interest or lien is not shown of record at the time of filing such notice, shall, for the purposes of this Section, be deemed a subsequent purchaser and shall be bound by the proceedings to the same extent and in the same manner as if he or she were a party thereto. If in any such action plaintiff or petitioner neglects or fails for the period of 6 months after the filing of the complaint or petition to cause notice to be given to the defendant or defendants, either by service of summons or publication as required by law, then such notice shall cease to be such constructive notice until service of summons or publication as required by law is had.

14th Amendment to the United States Constitution, Section 1

AMENDMENT XIV

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Robert Powers Estate was opened; his will was admitted to probate and Ralph N. Powers was appointed as an independent executor on October 27, 1995 in the Circuit Court of Clark County, Illinois (R-22). On November 1, 1995, the Executor Ralph N. Powers, entered into a written contract with Terry Stephen for purchase of real estate owned by the decedent (R-80-82). On November 9, 1995, Virginia Huckaba filed a Petition to Terminate Independent Administration (R-28). She and Robert G. Powers filed a Petition to Contest the Will (R-29-32) and in connection with the will contest caused a Lis Pendens Notice to be recorded in Clark County on November 9, 1995 (R740-741). The Trial Court terminated the independent administration on January 8, 1996 (R3-4). On January 12, 1996, the Executor filed a Petition to Sell Real Estate and Personal Property and attached a copy of the Contract with Stephens thereto (R63-83). Hearing on that

Petition was set for January 24, 1997 (R-3). A written Order denying the Petition was signed on February 20, 1997 and filed on June 26, 1997. Stephen was not made a party to that proceeding. The will was set aside on October 16, 1999 (R-7). The Final Order in the will contest was entered on November 8, 1999. On 10/27/99 Virginia R. Huckaba received letters of independent administration (R-378). On 1/31/2001 Virginia R. Huckaba, as independent executor filed a Petition for Citation to Recover Assets and to discover information against Terry Stephen and citation was issued against him (R514-520). In response thereto Terry Stephen filed a response thereto on March 19, 2001 in which he alleged rights under the contract with the estate and in which he stated his contract was recorded on December 1, 1997 (R535-537).

On the same date, March 19, 2001, Terry Stephen filed a Complaint against Virginia Rose Huckaba as administrator to enforce the Contract with the estate in Cause No. 01-CH-12 in the Circuit Court of Clark County, Illinois. On August 3, 2001, the Citation and Complaint for Specific Performance were consolidated for trial (R-9). The trial was held as a bench trial before Judge Robert Cochonour on January 16-17, 2002 (R-10). The Court entered an Order on January 22, 2002 granting specific performance to Terry Stephen and setting aside his previous Order signed on February 20, 1997 and filed on June 26, 1997. The Order was filed on January 30, 2002 (R540-541). No appeal from that Order was taken within 30 days after it was entered. Terry Stephen filed a Petition for Representative to complete contract on September 30, 2002 (R-542).

A hearing was held thereon on December 2, 2004 before Judge Jacobs which resulted in an Order being entered on January 12, 2005 granting specific performance to Stephens (R-880-889). Said Order was appealed by Virginia R. Huckaba on January 24, 2005 (R-892) to the Appellate Court and the Appellate Court entered an Order

on November 9, 2005 (App. A1-11) reversing the Trial court's Order appealed from entered on January 12, 2005, Appendix A, pp. A12-13.

TIME OF RAISING CONSTITUTIONAL ARGUMENT

The constitutional argument was raised by Stephen at the earliest possible time by the filing of a Petition for Rehearing in the Appellate Court. Why?

Because until the Appellate Court issued it's opinion, Stephen could not have been aware that the Appellate Court, in it's Opinion, would ignore the portion of the Order of the Trial Court entered on June 26, 1997 (which the Appellate Court based it's Opinion on), which Trial Court Order recited that the Order and whole proceeding from which the Order resulted was based on Section 20-4 of the Probate Act of the State of Illinois. (755 ILCS 5/20-4). We submit that the following section of the statute, 755 ILCS 5/20-5(B) and (C), requiring Stephen to be made a party-defendant and served with Summons before he would be bound by the Order applied to the Order. The Appellate Court's failure in it's Opinion to follow those two sections of the Probate Act resulted, for the first time, in the denial of Stephen's constitutional rights in the Appellate court's Opinion and therefore the earliest opportunity he had to raise the constitutional argument was in his Petition for Rehearing in the Appellate Court.

Prior to the proceeding in the Appellate Court, the Trial Court, when faced with the effect of the Order of June 26, 1997 on Stephen's rights under his contract with the estate held that the Order insofar as it applied to Stephen's rights was void as to Stephen because he was not made a party to the proceeding.

We submit further that the argument which the Appellate Court adopted in it's Opinion was never made by either of the parties to this appeal so that the first time Stephen could have raised the constitutional argument was in his Petition for Rehearing at which time he did raise it.

The Appellate Court, Fourth Appellate District's response to the constitutional argument was to deny the entire Petition for Rehearing, including the constitutional argument on November 29, 2005.

REASONS FOR GRANTING WRIT

(1) Can the Appellate Court by it's Opinion, where Stephen was not made a party-defendant to the proceeding in the Trial Court which resulted in the Order filed on 6/26/97, was not served with summons or otherwise entered his appearance therein, although the applicable statute required he be joined as a party-defendant, be denied his property rights by that opinion under a Contract to Purchase Real Estate from the estate without violating his rights under the 14th Amendment to the Constitution of the United States guaranteeing him that he would not be denied his property without due process of law?

Rule 10(b) of the Rules of the United States Supreme Court provides that one of the grounds for the Supreme Court of the United States to grant a Writ of Certiorari is "A state court of last resort has decided an important Federal Question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.

We submit that the opinion complained of here by the Appellate Court for the Fourth Appellate District of Illinois entered on November 9, 2005 in this cause has

decided an important Federal question in a way which conflicts with the decision of another or several other Illinois State Courts of last resort.

As to what we submit the law to be in the State of Illinois decided by Illinois Courts of last resort is, we cite the case of *City of Chicago vs. Cohn*, 326 Ill. 372, 158 NE 118 (1927) at pages 374 and 375 of the Illinois Report. The Court stated: "The guarantee of due process of law requires that every man shall have the protection of his day in Court and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. "Citations . . . the essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case. Citations."

To the same effect, see: *Pettigrew vs. National Accounts System, Inc.*, 67 Ill. App. 2d, 344, 351, 213 NE2d 778 (1966):

"Also see: *Durkin v. Hey*, 376 Ill. 292, 300, 33 NE2d 463 (1941); *Truax v. Corrigan*, 257 U.S. 312, 332 (1921); Simon v. Craft, 182 U.S. 427, 436 (1901); *In Re: Estate of Hoffman*, 49 Ill. App.2d 436, 441, 200 NE2d 37 (1st Dist. 1964).

> [4,5] A fundamental requisite of procedural due process is that every man shall have the protection of his day in Court and the benefit of an orderly proceeding according to the general law or established rules; and that the hearing shall not be arbitrary, but rather shall afford to him an opportunity to be heard in his defense and shall assure to him an inquiry on the issues of the case, wherein judgment is rendered only after trial.

> There must be an intrinsic fairness of procedure by which any judgment, order or decree is rendered. This is essential to the untainted administration of Justice—the most cherished aspect of our judicial system.
>
> [6] Tested by these standards, we find that appellants were not afforded the due process guaranteed them by our Constitutions. What is, or is not, a denial of due process does not readily lend itself to any refined definition, but it can be rendered progressively more clear by the course of litigation. Where, however, the procedure followed by a court is so lacking in a principle or principles basic to our system of justice that it offends the system, that procedure must be condemned as a denial of due process."

To the same effect are the following Illinois cases: *Rabbitt vs. Weber & Company*, 297 Ill. 491 @ 496 and 497 (1921) 130 NE 2787; *Chicago vs. American National Bank & Trust Company*, (1988) 121 Ill. Dec. 608 @ 613, 171 Ill. App 3d 680 525 NE2d 915.

Applying that rule to the decision of the Appellate Court in this case, we submit that the Appellate Court has contradicted the rule cited above by it's opinion entered on November 9, 2005. It has effectively denied Stephen's property right in his contract for the purchase of real estate from the Huckaba Estate without a hearing, without summons served upon him and without an opportunity to be heard. Indeed, the Trial Court, by it's very order filed on June 26, 1997, indicated this was a proceeding under the Illinois Probate Act to sell real estate to pay debts which required that summons be issued against Stephens and he be served with summons or it would not be binding upon him. This was not done and we submit that the Appellate Court's Opinion violated Ste-

phen's right to due process under the 14th Amendment of the United State's Constitution.

This case is a case very similar to the case both on the facts and law of *Harry L. Alward vs. Borah*, 1942, 381 Ill. 134 @ 173 which held that for a person with an interest in real estate which is sold under what is now 755 ILCS 20-4, (a probate proceeding to sell real estate to pay debts), he must be made a party to that proceeding in order for his interest to be effected, i.e., if he is not joined as a party-defendant and served with summons, the Order insofar as it applied to him is void. To the same effect, see, *In Re: Estate of Day*, 1994, 199 Ill. Dec. 878 at pp. 879, 880, 261 Ill. App. 3 993, 634 NE2 1232, 3rd Appellate District, which case held the same thing as the Alward case (supra) and is based on the present statute.

We submit in this case the Appellate Court, 4th District did hold contrary to the rule announced in those opinions in its Opinion.

The basis of the Appellate Court's decision was that the Order entered on June 26, 1997 in a 755 ILCS 5/20-4 proceeding to sell real estate to pay debts, to which Stephen was not a party, deprived him of his interest in the real estate because he had actual notice thereof even though his interest pre-dated the Petition to Sell Real Estate. We submit that 755 ILCS 5/20-5(B) and (C) required he be joined as a party-defendant to that proceeding and be served with summons for the Order to be binding on him. We submit that because he was not made a party-defendant or served with summons, that Order was void as to Terry Stephen. He signed the contract on November 1, 1995 (R 80-82). The Petition to Sell Real Estate was filed on January 12, 1996 (R 63-83) and the Order denying the Petition was entered on June 26, 1997 (R 116). We submit that under the authorities cited herein, contrary to the Appellate Court's opinion, Stephen should

not have lost his interest in the real estate as a result of that Order being entered.

(2) That Rule 10(c) of the Rules of the Supreme Court of the United States provides that one of the grounds for granting of a Writ of Certiorari is that a State Court . . . has decided an important Federal question in a way that conflicts with relevant decisions of the United States Supreme Court. We submit that the decision of the Appellate Court, Fourth District, complained of in this Petition for Writ of Certiorari does contradict the decisions of the United States Supreme Court. We cite the case of *Mullane vs. Central Hanover Bank & Trust, et al*, 339 U.S. 306 (1950) at page 313 wherein the Court says, " Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." . . . "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis vs. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 783, 58 L. Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." . . . "[8] An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278, 132 A.L.R. 1357; *Grannis v. Ordean*, 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363; *Priest v. Board of Trustees of Town of Las Vegas*, 232 U.S. 604, 34 S. Ct. 443, 58 L. Ed. 751; *Roller v. Holly*, 176 U.S. 398, 20 S. Ct. 410, 44 L. Ed. 520."

Other cases to the same effect are *Parklane Hosiery Co. vs. Shore*, 439 U.S. 322, 327 n. 7, 99 S. Ct. 645, 649, n. 7, 58 L. Ed. 2d 552, 559 n.7 (1979).

Memphis Light, Gas & Water Division, et al., Petitioners, vs. Craft, 436 U.S. 1, 13-16, 98 Supreme Court Reporter, p. 1554, 1562, 1563, 56 L. Ed.2d 30, 41-43.

We submit that the action of the Appellate Court, Fourth District in this case and it's Order and Opinion dated November 9, 2005 contradicts and conflicts with the above cases in the above United States Supreme Court. We submit further that the holding of the opinion that Stephen did not have to be joined as a party-defendant in the probate proceeding where the statute required he be joined in order to bind him, constitutes a denial of due process of law against him under the provisions of the 14th Amendment of the United States Constitution

(3) Where the Illinois Statute governing Lis Pendens provides that it does not apply to any party who is not given notice by service of summons or publication within six months after the Complaint is filed (735 ILCS 5/2-1901), we submit that the Appellate Court, by it's decision, created an unreasonable classification between owners of interest in real estate with actual knowledge of the proceeding and owners of interest in real estate with constructive knowledge of the proceeding under the Lis Pendens Act, and therefore did deny the Petitioner his property rights under it's Opinion of November 9, 2005 in violation of his rights to equal protection of the law guaranteed to him by the 14th Amendment to the United States Constitution.

That Rule 10(c) of the Rules of the United States Supreme Court provides that one of the reasons for granting a Petition for Writ of Certiorari in the Supreme Court of the United States is "the State Court has decided an

important Federal question in a way that conflicts with relevant decisions of the United States Supreme Court.

The Lis Pendens Act, (735 ILCS 5/2-1901 - App. pp. 37, 38, by it's very terms makes no distinction between claimants against the real property with actual notice of the proceeding and those with only constructive notice thereof. However, such claimants, whether by actual notice or constructive notice cease to be bound by the proceeding unless served with notice thereof by personal service of summons or publication within 6 months after the filing of the Complaint or Petition or in any event upon the termination of the lawsuit.

> *Eich v. Czervonko*, 1928, 330 Ill. 455, 459, 3 ALR 2d 373-374, par. 12.
>
> *Town of Libertyville vs. Moran*, 179 Ill. App. 3 880, 128 Ill. Dec. 868, 870, 871, 535 NE2 82 (1989)
>
> *Duncan vs. Farm Credit Bank of St. Louis*, U.S. Court of Appeals (1991), 940 Fed 1099 at pp. 1101,1102

In this case Terry Stephen was never given notice of the will contest by service of summons or publication, which terminated on November 8, 1999. We submit that any person affected by the Lis Pendens Act must have actual knowledge of the proceeding, which, if he didn't have actual knowledge before he was served with notice, we submit, had it after he was served with notice.

We submit the Appellate Court has, by it's Opinion, made an unreasonable classification between claimants with actual knowledge, but unaffected by the Lis Pendens Act and those claimants who are affected by Lis Pendens Act, by holding Stephen was bound by the Trial Court Order filed on June 26, 1997, without service of summons on him in contravention of his rights to equal protection of the law given to him by Section 1 of the 14th Amendment

to the U.S. Constitution and as required by 755 ILCS 5/20-5(B) & (C).

The Appellate Court, by it's opinion, for all the reasons stated herein, resulted in Stephen's loss of his property rights in his contract with the Huckaba Estate in violation of his due process rights under Article I, 14th Amendment to the U.S. Constitution and also resulted in loss of those same property rights under the Equal Protection Clause of the same constitutional provision because in this case the Appellate Court treated him to his detriment in it's Decision. We submit he would not have been treated to his detriment if the Court followed the provisions of the Probate Act and the Lis Pendens Act set out herein and the 14th Amendment to the United States Constitution.

That the Equal Protection Clause applies to State Court proceedings such as in this case, see:

> *Barrows v. Jackson* (1953), 73 S. Ct. 1031, 1037; and,
>
> *Shelley v. Kroemer*, 1949, 334 US 1, 19, 68 S. Ct. 836-845,92 L. Ed. 1161

In this case the Appellate Court has violated Stephen's right to equal protection of the law under the above Federal cases and the 14th Amendment to the U.S. Constitution.

When a right is given by a State Legislature to a citizen, denial of that right by a Court violates the 14th Amendment to the U.S. Constitution guaranteeing the citizens right to equal protection of the law. *U.S. ex. rel Keating vs. Bensinger*, 1971, 322 F. Supp. 784. In this case Stephen was given the right to be joined in the proceeding resulting in the Order filed by the Trial Court on June 26, 1997 by the statute (755 ILCS 5/20-5(B) and (C) passed by the Illinois Legislature, before he could lose his interest in the contract with the Estate. Under the Appellate Court's

Opinion, he need not be joined as a party-defendant contrary to the statute which opinion violated Stephen's right to equal protection of the law under the 14th Amendment to the U.S. Constitution.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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Dated this 15th day of May 2006.

APPENDIX

App. 1

NO.4-05-0073

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

TERRY STEPHEN, Plaintiff-Appellee and Cross-Appellant,	)	
v.	)	Appeal from Circuit Court
VIRGINIA ROSE HUCKABA, as Independent Administratrix of the Estate of ROBERT POWERS, JR., Deceased, Defendant-Appellant and Cross-Appellee,	)	of Clark County
	)	Nos. 01CH12 95P47
and	)	Honorable Robert W. Jacobs and Robert B. Cochnoour
ESTATE OF ROBERT POWERS, JR., a/k/a ROBERT JUNIOR POWERS, Deceased.	)	

PRESIDING JUSTICE COOK delivered the opinion of the court:

This case involves an executor's contract to sell real estate. More than five years after the contract was signed, after the main residence on the premises had been destroyed by fire and after the executor had been removed from office, the buyer brought an action for specific performance. The trial court ordered specific performance, giving the buyer credit for the insurance proceeds with the result that the buyer would pay $4,591.55 for 34.5 acres of land plus a second residence. The buyer was also awarded attorney fees under the contract on the basis that the seller had defaulted.

I. BACKGROUND

Robert Powers, Jr., died October 23, 1995. His purported last will and testament, dated July 13, 1993, left $1 each to his son, Robert Eugene Powers, and to his daughter, Virginia Rose Huckaba. The bulk of the estate was left to Powers's brother, Ralph N. Powers, and Powers's sister, Nellie Roberts. The purported will nominated Ralph to serve as executor without bond and gave the executor "full power and authority without court order to sell or otherwise dispose of any of my property."

The purported will was admitted to probate and Ralph was issued letters of office as executor on October 27, 1995. Five days later, November 1, 1995, before notice of the probate proceedings was mailed, Ralph entered into a real estate contract to sell Powers's residence and all personal property in and about the premises to Terry Stephen for $65,000. See 755 ILCS 5/6-10(a) (West 2004) (notice must be given not more than 14 days after order admitting will or appointing representative). The residence consisted of two houses and approximately 34.5 acres of land.

Immediately after they were served, Powers's son and daughter filed (November 9, 1995) a petition to contest the will and at the same time filed a lis pendens notice with the county recorder of deeds. On October 16, 1999, following a jury trial, the purported will was declared invalid and the letters issued to Ralph were revoked. Virginia Rose Huckaba was issued letters of independent administration on October 27, 1999.

A. The June 26, 1997, Order

On January 12, 1996, while the petition to contest the. will was pending, Ralph filed a petition for leave to sell decedent's real estate, attaching a copy of the real estate purchase contract with Stephen. The petition to sell asked

that Ralph be ordered to complete the real estate purchase contract and that the lis pendens notice be released. Leave of court is not necessary where the sale is made by a representative under a power given in a will. 755 ILCS 5/20-15 (West 2004). Apparently Ralph and/or Stephen was uncomfortable proceeding without an order of the court, given the fact that a petition to contest the will was pending. On March 26, 1996, the main residence on the property and all contents thereof were destroyed by fire. On February 20, 1997, Judge Robert B. Cochonour signed an order, filed June 26, 1997, finding "that it is not .in the best interest of the estate to complete the contract to sell the real estate." The order had been approved as to form by the parties.

After her appointment October 27, 1999, the independent administratrix collected a real property insurance payment in the amount of $56,223.93 and a personal property insurance payment in the amount of $3,950. She also paid the real estate taxes on the property for 1996, 1997, 1998, 1999, and 2000.

B. The January 30, 2002, Order

On March 19, 2001, Stephen filed a new complaint for specific performance of the November 1, 1995,_real estate con-tract. That action was consolidated with the probate case. On January 22, 2002, Judge Cochonour signed a "Judgment of Court," filed January 30, 2002, finding that Stephen "is granted judgment of specific performance." "The [c]ourt has also relied on the testimony regarding the good[-]faith nature of the transaction in that the [e]xecutor made inquiry into the value of the property before entering the contract, and that it does not appear to be unconscionable." The court "respectfully denies judgment of relief as requested in the [a]mended [c] omplaint for [s] pecific Eplerformance" (a request for attorney fees under para-

graph 9 of the real estate contract). The court found that Stephen was obligated to pay real estate taxes:

> "as if the sale was closed on the anticipated date of December 1, 1995. In addition, if defendants have paid any sums for the subscription and obtainment of rural water, they shall be entitled to recover such costs."

The order did not mention that the residence had been destroyed by fire or that insurance proceeds had been received. The court, without comment, vacated its order entered on February 20, 1997, which had found "that it is not in the best interest of the estate to complete the contract to sell real estate."

Judge Cochonour resigned from office May 25, 2002. On January 3, 2003, Judge Cochonour entered a plea of guilty to theft in excess of $100,000, as executor, from the estate of Jay E. Hayden, deceased, a Class 1 felony. 720 ILCS 5/16-1(a) (West 2004); People v. Cochonour, case No. 03-CF-1 (Cir. Ct. Cumberland Co.). Stephen's attorney, Ralph Glenn, and his firm represented. the estate of Jay Hayden and Judge Cochonour at least from March 6, 2002, to June 24, 2002, for which they were paid $7,512.50. The independent administratrix complains that Glenn represented Judge Cochonour while Cochonour was still assigned to this case. Glenn responds that there is no showing in this record that anything was set in front of Judge Cochonour after the order was filed on January 30, 2002, although technically it was still under him.

On September 20, 2002, Stephen filed a "Petition for Representative to Complete Contract," asking that his reimbursement of the estate for taxes be set as follows: 1995, $63.42; 1996, $501.50; 1997, $190.48; 1998, $316.34; 1999, $332.75; and 2000, $357.76. Stephen asked for a credit against the purchase price in the amount of the insurance proceeds, $56,233.93 and $3,950. A handwritten

provision in the contract stated, "13. INSURANCE: Seller shall keep premises insured and in the event of loss, proceeds shall be payable to the Buyer and Buyer shall pay this contract in full." Such a credit would allow Stephen to purchase the real estate for less than $5,000, even though its appraised value on October 21, 1997, was $47,000. Stephen again asked for attorney fees pursuant to paragraph 9 of the contract, which provided that "Ed]efault by any party of this Contract shall entitle the non-defaulting party to *** attorney's fees and expenses incurred in connection with judicial enforcement of this Contract."

The court (Judge Jacobs) entered an opinion August 19,. 2004. Defendants filed a notice of appeal (No. 4-04-0827). Stephen moved to dismiss the appeal as premature, stating that there were "untried and unresolved issues in the trial court." On October 20, 2004, Stephen's motion to dismiss appeal as premature was allowed by this court.

C. The January 12, 2005, Order

The trial court (Judge Jacobs) then entered a formal judgment order January 12, 2005, which was approved as to form by the parties. The judgment directed the independent administratrix to execute a deed to Stephen in the form set out in an exhibit. The judgment agreed with Stephen's calculation of taxes, agreed that Stephen was entitled to a credit for the insurance proceeds, and directed him to pay $4,591.55 in exchange for the deed. The judgment recited that it was a final, appealable order, appealable under Supreme Court Rule 304(b)(1) (134 Ill. 2d R. 304(b)(1)), and if for any reason it was not appealable under that rule, then the court found that it was appealable under Rule 304(a) (134 Ill. 2d R. 304(a)). Defendants filed a notice of appeal January 24, 2005.

II. ANALYSIS

Stephen argues that Judge Cochonour's order entered January 22, 2002, was a final, appealable order, no appeal was taken, and the matters adjudicated therein can no longer be disputed. Stephen does not dispute, however, that issues remained pending after the January 22, 2002, order that may be properly addressed in the present appeal. We review questions of law, including the construction of statutes and supreme court rules,. de novo. In re Estate of Burd, 354 Ili. App. 3d 434, 436, 820 N.E.2d 613, 615 (2004).

A. Immediate Appeal of Orders in Estates

Supreme.Court Rule 304(b)(1) provides that the following judgments and orders are appealable without the finding required under Rule 304(a): "A judgment or order entered in the administration of an estate *** which finally determines a right or status of a party." 155 Ill. 2d R. 304(b) (1) . Orders within the scope of Rule 304(b)(1), even though entered before the final settlement of estate proceedings, must be appealed within 30 days of entry or be barred. In re Estate of Devey, 239 Ill. App. 3d 630, 633, 607 N.E.2d 685, 687 (1993); In re Estate of Thorp, 282 Ill. App. 3d 612, 616, 669 N.E.2d 359, 362 (1996). "A central reason behind making the time for appeal of such orders mandatory, and not optional, is that certainty as to some issues is a necessity during the lengthy procedure of estate administration." In re Estate of Kime, 95 Ill. App. 3d 262, 268, 419 N.E.2d 1246, 1250 (1981). Without the Rule 304(b)(1) exception, an appeal would have to be brought after an estate was closed, the result of which might require reopening the estate and marshaling assets that have already been distributed. That result would be both impractical and inefficient. Thorp, 282 Ill. App. 3d at 616-17, 669 N.E.2d at 362.

Only final orders fit within Rule 304(b)(1). It is not necessary that the order resolve all matters in the estate, but . it must resolve all matters on the particular issue. "'A final judgment is one that fixes absolutely and finally the rights of the parties in the lawsuit *** and disposes of the entire controversy; it is final if it determines the litigation on the merits so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment.'" W.L. Miller Co. v. Zehnder, 315 Ill. App. 3d 799, 804, 734 N.E.2d 502, 506 (2000), quoting Pekin Insurance Co. v. Benson, 306 Ill. App. 3d 367, 375, 714 N.E.2d 559, 565 (1999).

Judge Cochonour's January 22, 2002, order clearly did not dispose of the entire controversy. The. order appears to be more of a memo than a final resolution of all issues connected with the contract for sale. It did not address the major question whether Stephen was entitled to a credit for the insurance proceeds. The order contains a number of "ifs": "if" defendants have paid any sums for water; taxes shall be paid "as if" the sale closed on December 1, 1995. Stephen's argument that the order was final is inconsistent with the position he later took as to attorney fees. The order of January 22, 2002, refused to allow Stephen attorney fees and expenses under paragraph 9 of the real estate contract, but Stephen subsequently petitioned for such fees, and the trial court allowed the petition as to attorney fees incurred since its order of August 17,. 2004. Stephen argues that Judge Cochonour's order of January 22, 2002, was the entry of the final judgment and subsequent proceedings were only to enforce that judgment. In fact, every order entered in this case has addressed enforcement of the contract. An attempt to obtain. specific performance is an attempt to enforce a contract. The proceedings continued after the January 2002 order; they did not come to a halt.

The true final order in this case was the order entered June 26, 1997, when Judge Cochonour denied Ralph's petition asking that he be ordered to complete the 'real estate purchase contract. Judge Cochonour found "that it is not in the best interest of the estate to complete the contract to sell the real estate." That order disposed of the entire controversy and no appeal was taken, as required by Rule 304(b)(1). Judge Cochonour was not free to ignore the June 26, 1997, order when he revisited the matter in January 2002. The various orders in this case addressed different allegations made by the parties: a petition for an order to complete the contract, a complaint for specific performance, a petition to complete contract. Still, there was only one cause of action here, an attempt to enforce the con-tract. Separate claims constitute the same cause of action if they arise from a single group of operative facts even if they assert different theories of relief. River Park, Inc. v. City of Highland Park, 184 Ill. 2d 290, 311, 703 N.E.2d 883, 893 (1998). In 1997, Judge Cochonour ruled that the contract should not be. completed. That should have finished the matter.

It is true that Stephen was never formally made a party to the 1996 probate proceedings. Nevertheless, Stephen's rights under the real estate contract were dependent on the power of the executor to sell the property. After the court's order of June 26, 1997, the executor had no power to sell the property or comply with the contract.

B. Section 20-15 of the Probate Act

Judge Cochonour's January 22, 2002, order relied.on section 20-15 of the Probate Act of 1975 (Probate Act) (755 ILCS 5/20-15 (West 2004)) for the proposition that the executor was required to complete the contract even after the will had been revoked and the executor removed. "The [c]ourt would further represent that its ruling has been

influenced by the practical need to accommodate transfer [of] property in probate proceedings without unduly burdening the purchaser of property subject to probate proceedings with extreme or laborious inquiry as to the status of the estate." Judge Jacobs's order of August 19, 2004, did the same.

Section 20-15 of the Probate Act contains the following language:

> "If a representative leases, sells[,]] or mortgages a decedent's real estate or interest, the lease, sale[,] or mortgage is valid regardless of the subsequent setting aside of the will or any other action which might limit or restrain the right of the representative to lease or to convey title or to mortgage the real estate or interest. A lessee, purchaser[,] or mortgagee from a representative obtains the same title or interest as though the instrument were executed by the decedent immediately prior to his death, and the rights and claims of all parties claiming under or through the decedent thereupon are transferred to the consideration received or to be received from such lease, sale[,] or mortgage." (Emphases added.) 755 ILCS 5/20-15 (West 2004).

See also 755 ILCS 5/23-8 (West 2004) (acts done before revocation of letters are valid).

The property subject to the real estate purchase contract here was not sold; there was never a closing, a transfer of possession, or payment of the purchase price. The executor, Ralph Powers, did not attempt to sell the property under section 20-15 but only filed a petition to sell real estate pursuant to section 20-4. See 755 ILCS 5/20-15, 20-4 (West 2004).

The purpose of section 20-15 is to protect bona fide purchasers for value without notice. Once a transaction

has proceeded to the point that the purchaser has paid the purchase price and taken possession, the transaction is final. Executors' deeds would not be very marketable if they could be set aside years after they were made. Section 20-15 makes the time of sale the cutoff point. Purchasers are, however, bound by the setting aside of a will or other actions that limit or restrain the right of the representative to convey title if those events occur prior to sale. Executors do not have the power to make will contests or petitions to remove irrelevant by simply entering into preliminary negotiations for sale.

The argument is made that the language in section 20-15, "consideration received or to be received," broadens the application of the section beyond sales to include contracts for sale. Under that interpretation it would be irrelevant whether a "sale" had taken place. It is not inconsistent to have a completed sale and for payments to be received in the future, as where the buyer gives the seller a note for the purchase price. We conclude section 20-15 only applies when there has been a sale.

C. Notice to Stephen

A fact is sufficient to put a person on notice if it would put a reasonable person on inquiry. Reed v. Eastin, 379 Iii. 586, 592, 41 N.E.2d 765, 768 (1942). A purchaser from an executor is charged with notice of the extent of the testamentary authority conferred by the will. 31 Am. Jur. 2d Executors & Administrators §846 (2002). A purchaser from an executor is also charged with notice of the court proceedings in which the will has been probated. Parties with actual notice of pending proceedings affecting the property are subject to the lis pendens, doctrine even if there has been no compliance with the filing requirements of the statute (735 ILCS 5/2-1901 (West 2002)). First Midwest v. Pogge, 293 Ill. App. 3d 359, 363, 687 N.E.2d 1195, 1198

(1997). Stephen's real estate purchase contract here listed "Ralph N. Powers, [e] xecutor of the [e] state of Robert Powers, Jr.," as the seller. Stephen accordingly had actual knowledge of the existence of the estate proceedings. III.

CONCLUSION

Accordingly, we reverse the trial court's order requiring Virginia, as independent administratrix of the estate, to complete the contract and pay Stephen's attorney fees incurred since August 19, 2004. As a result of our ruling, the contract does not give Stephen a right to possession of the personal property of the estate. Therefore, we remand for further proceedings on the petition for citation to recover assets and to discover information filed by Virginia, as independent administratrix, on January 31, 2001.

Reversed and remanded with directions.

STEIGMANN and McCULLOUGH, JJ., concur.

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT
CLARK COUNTY, ILLINOIS

Terry Stephen,
Plaintiff,

vs. No. 01-CH-12

Virginia Rose Huckabe, as Independent Administrator of the Estate or Robert Powers, Jr., deceased, No. 95-P-47
Defendant.

Estate of Robert Powers, Jr.,
Deceased.

JUDGMENT OF COURT

Proceedings on this cause were had before the Court on January 16 and 17, 2002. The Court would find that these proceedings addressed the Complaint, Amended Complaint, and Affirmative Defenses. Testimony, exhibits, representation, matters on file, the Illinois Probate Act and cited cases have all been considered.

Considering the above referenced matters, the Court finds that the Plaintiff purchaser herein is granted judgment of specific performance of the contract to purchase the decedent's real estate. The Court would specifically cite 755 ILCS 5/20-15 in support of its finding. The Court has also relied on the testimony regarding the good faith nature of the transaction in that the Executor made inquiry into the value of the property before entering the contract, and that it does not appear to be unconscionable.

The Court respectfully denies judgment of relief as requested in the Amended Complaint for Specific Performance. The Court finds that the defendants have also acted in good faith in bringing their various equitable remedies of an affirmative nature; even though they are found to be without merit.

The Court would further represent that its ruling has been influenced by the practical need to accommodate transfer or property in probate proceedings without unduly burdening the purchaser of property subject to probate proceedings with extreme or laborious inquiry as to the status of the estate.

The Court would further find and provide that all real estate taxes on this property due and payable by Plaintiff and Paragraph 3 regarding real estate taxes shall be interpreted to apply to the real estate taxes as if the sale was closed on the anticipated date of December 1, 1995.

In addition, if defendants have paid any sums for the subscription and obtainment or rural water, they shall be entitled to recover such costs and charges expended against the plaintiff herein.

In accordance with the foregoing determination, the Court in 95-P-47, also subject to these proceedings, would vacate its order entered therein on February 20, 1997. Also as to the probate case referenced above, the Court finds that the personal property subject to the contract removed from the residence prior to the fire is the property of the plaintiff and awards same to him.

This Judgment entered at Toledo, Illinois this 22nd day of January, 2002.

/s/ ROBERT B. COCHONOUR, Circuit Judge

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT
CLARK COUNTY, MARSHALL, ILLINOIS

IN THE MAI"1'ER OF ROBERT POWERS, JR., deceased,	)	
VIRGINIA ROSE HUCKABA and ROBERT G. POWERS, Petitioners,	)	
VS.	)	No. 95-P-47
RALPH N. POWERS, individually and as executor of the Estate of Robert Powers, Jr., Deceased, and NELLI ROBERTS, Defendants.	)	

ORDER

This cause coming on to be heard on the Petition to Sell Real Estate, Ralph N. Powers, Executor, present in person by counsel, Petitioners present by counsel, the Court having heard arguments of counsel, having examined the pleadings of the parties and being fully advised in the premises finds as follows:

1. That the court has jurisdiction of the parties and the subject matter.

2. That it is not in the best interest of the estate to complete the contract to sell the real estate.

3. That this matter is brought pursuant to Section 20-4 of the Probate Act of the State of Illinois.

WHEREFORE, it is ordered that the Executor of the Estate of Robert G. Powers does not have leave of court and shall not complete the contract to sell real estate dated January 12, 1996 with prospective buyer, Terry Stephen.

Dated: February 20, 1997 ENTER: _____

/s/Judge

Approved As To Form:

_____

/s/ Joseph R. Schroder, Attorney for Defendants

_____

/s/ O. Anthony Siemer, Attorney for Petitioners

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
201 WEST MONROE STREET
P.O. BOX 19206
(217) 782-2586
SPRINGFIELD, ILLINOIS 62794-9206

DATE: 12/05/2005

RE: Stephen, Terry v. Huckaba, Virginia, as Adm.
Powers General No.: 4-05-0073

Clark 01CH12, 95P47

TO COUNSEL:

The court today denied the petition for rehearing filed in the above entitled cause.

The mandate of this court will issue in 21 days to the Clerk of the Circuit Court unless an affidavit of intent to seek review in the Illinois Supreme Court (Rule 368) is filed in this court.

DARRYL PRATSCHER,
Clerk Appellate Court Fourth District

TO: Frederick E. Roth
Roth Law Firm
47 E. Chicago Avenue, Suite 360
Naperville, IL 60540

Ralph D. Glenn
Glenn & Logue
901 Charleston Avenue, P.O. Box 146
Mattoon, IL 61938

SUPREME COURT OF ILLINOIS 101764CLERK OF THE COURT

SUPREME COURT BUILDING

SPRINGFIELD, ILLINOIS 62701

(217) 782-2035

March 29, 2006

Mr. Ralph D. Glenn
Glenn & Logue
901 Charleston Avenue, P.O. Box 146
Mattoon, IL 61938

No. 101764 - Terry Stephen, petitioner, v. Virgina Rose Huckaba, etc., respondent. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 20, 2006.

PETITION FOR REHEARING

I

THE TRIAL COURT'S ORDER ENTERED ON FEBRUARY 20, 1997 AND FILED JUNE 26, 1997, COULD NOT AND DID NOT TAKE AWAY THE CONTRACTUAL RIGHTS OF STEPHEN.

This Court's Opinion is based on the Order entered on June 26, 1997 denying the Executor's Petition to Sell Real Estate involved in this case which this Court held deprived Stephen of his interest in said real estate.

The Court Order entered by the Trial Court on June 26, 1997 denying the Executor's Petition to Sell Real Estate described therein, by the language of the Court, the Court found that the Petition and the Order were filed under 755 ILCS 5/20-4. Stephens was not joined as a party to that proceeding. This Court, in its Opinion, held that even though he was not joined as a party defendant thereto, he was bound thereby and lost his claim to the real estate described therein as a result thereof.

We point out to this Court that a proceeding under 755 ILCS 5/20-4 is governed by 755 ILCS 5/20-5, "procedure for sale or mortgage of real estate," and paragraph "b" thereof which provides, "all persons holding liens against or having an interest in the real estate, (emphasis supplied), or in the oil, gas, coal or other mineral interest or in any part thereof, described in the Petition, in possession or otherwise whose rights are sought to be affected by the Order . . .. shall be made parties defendant."

Harry L. Alward vs. Borah, 1942, 381 Ill. 134 commencing on page 137 holds:

> The mineral deeds of appellees were on record, and appellant, as purchaser of the premises, was bound to examine the title and ascertain what he was

getting through the deed of the executor. . . . Appellees, as owners of record of an interest in the real estate involved, were entitled to notice of the proceeding. . . . It is a principle that lies at the foundation of all jurisprudence in civilized countries, that a person must have an opportunity of being heard, before a court can deprive such person of his rights. To proceed upon any other rule, would shock the sense of justice entertained by mankind, would work great wrong and injustice, and render the administration of justice a mere form. Until a person is made a party to a suit, and is afforded a reasonable opportunity of being heard in defense of his rights, a court has no power to divest him of a vested right. So far as we know, we have never departed from this rule, but have reaffirmed it many times. . . . There can be no doubt about either legal proposition advanced, but this does not dispose of the requirement that the interested parties must be brought before the court in such a proceeding. . . . and since the statute expressly provides that not only heirs, but also all persons holding liens or having or claiming any interest, in possession or otherwise, must be made parties to such a proceeding, it necessarily follows that before grantees of an heir or devisee may be deprived of their rights in a proceeding under the statute to pay debts, they must have had their day in court. . . . and no single case cited holds that a person acquiring an interest from an heir or devisee may be deprived of his rights in a proceeding by the administrator or executor to sell property to pay debts without being made a party and served with process, as required by the statute or law then in effect. It follows that the proceeding of the executor in the present case against the appel-

> lees was without any force or effect whatever. . . . They were not parties thereto, and are not bound thereby.

The second case is *In Re: Estate of Day*, 1994, 199 Ill. Dec. 878 @ pp. 879, 880, 261 Ill. App. 993, 634 NE2d 1232 which relies heavily on the first case cited.

> In this case, we are asked to decide whether a contract purchaser of real estate from a decedent's estate is a person having an interest in the real estate within section 20-5(b) of the Probate Act of 1975 (755 ILCS 5/20-5(b) (West 1992)). We hold that the purchaser does come within the statute and should be made a defendant in the proceeding for court approval of the sale. Rosemary Cleaver and Marie Clark were the sisters and only heirs of decedent Ora B. Day. They entered into a real estate contract where, as sellers, they agreed to sell decedent's five room home and approximately 20 acres of land in rural Marshall County to Leonard Scott (buyer) for $34,900. The contract identified both Cleaver and Clark as executors of the estate of Ora B. Day but in fact, decedent died without a will and Cleaver was administrator of his estate. The contract included the following provision: "This Contract is contingent upon the court approval of the Estate of ORA B. DAY, Deceased, to sell said real estate." . . . Buyer filed a complaint for specific performance of the contract in chancery on June 3, 1993, and on July 28, 1993, Cleaver filed a petition to sell the real estate in probate, Paragraph six of the petition states: "6. The nature and extent of all liens and other interests, if any, on the real estate, known to me, are: Complaint for Specific Performance was filed by Leonard D. Scott, Plaintiff in Marshall County Circuit Court, case No. 93-CH-07." A hearing on

the petition to sell was set for August 31, 1993, and notice was sent to both the attorney for Clark and the attorney for buyer. The record shows that Clark filed an entry of appearance and an objection to the petition to sell, asserting that the sales price was less than 65 per cent of the fair market value of the property. After hearing evidence and arguments of counsel, the trial court denied the petition to sell. Buyer later filed a petition to vacate the order and for rehearing, alleging that he should have been made a party defendant under section 20-5 of the Probate Act. The petition indicated that the buyer's attorney had appeared at the August 31 hearing to object to Clark's opposition to the petition but was not allowed to participate in the proceeding. The trial court denied the petition to vacate and expressly found that buyer was not an interested person. After the petition to sell was denied, Cleaver filed a motion to dismiss the complaint for specific performance on the ground that sellers could not perform the contract since the probate court had refused to approve the sale. The trial court granted Cleaver's motion to dismiss with prejudice and later denied buyer's subsequent motion to reconsider. Buyer appealed from the order denying his petition to vacate the dismissal of his complaint for specific performance. This court has consolidated the two cases for consideration on appeal. We conclude that the circuit court of Marshall County erred in refusing to allow buyer's motion to vacate the order denying the petition to sell the real estate. Section 20-5 of the Probate Act prescribes the procedure for sale of a decedent's real estate. The representative of the estate must file a petition in the probate proceeding describing the real estate,

any liens and other interests, and attaching a copy of the proposed contract of sale. The relevant part of section 20-5(b) is as follows: "(b) All persons holding liens against or having an interest in the real estate . . . described in the petition in possession or otherwise whose rights are sought to be affected by the order, shall be made parties defendant." The sellers argue that only persons having an existing interest in real estate prior to the time the contract was executed have been held to be necessary defendants. . . . However, we do not read the statute so narrowly, and we have not found any cases construing the language of this statute to either include or exclude contract purchasers as persons having an interest in the real estate sought to be sold. Our interpretation of the plain language of this provision is to include a contract purchaser as a person having an interest in the real estate . . . whose rights are sought to be affected by the order approving or disapproving the sale. If the legislature had intended to limit necessary party defendants under section 20-5 to persons with pre-existing or vested interests in real estate, such language could easily have been added. An earlier version of section 20-5 required that all persons having an interest in the real estate, inchoate or otherwise be made parties defendant. The word inchoate was deleted in a 1941 amendment and the clause whose rights are sought to be affected by the decree was added. . . . By stating that all persons whose rights would be affected by the order to sell must be made defendants, the legislature adopted language sufficiently broad to include the purchaser under a contract of sale. . . . Buyer is entitled to have an opportunity to be heard before a court can deprive

> him of his rights. . . . Our reversal of the probate order does not turn on the sufficiency of the evidence, but on the exclusion of a party who was necessary to the proceeding as a matter of law. The absence of a report of proceedings or bystander's report has no impact on the question of law at issue here. When we reverse the probate order, we must also reverse the dismissal of Scott's complaint for specific performance. The dismissal order was based solely upon the previous denial of the petition to sell. Both causes must be reopened for further proceedings consistent with this decision. We emphasize that our ruling affects only buyer's right to be heard, not the substantive question of the propriety of the proposed sale. That issue must be decided by the trial court after hearing the evidence offered by all parties to the hearing. For the reasons stated, we reverse the order denying Cleaver's petition to sell real estate and the order dismissing Scott's complaint for specific performance of the contract, and we remand both causes to the circuit court of Marshall County for further proceedings.

We submit that Stephen was a necessary party to the February 20, 1997 proceeding. He was not made a party defendant thereto. He was not served with Notice of Hearing. He did not enter his appearance and under the statutes cited and the cases cited, he was not bound by the Order. We submit he lost no rights in real property at issue in this lawsuit as a result of the February 20, 1997 hearing. Appellee attaches a true copy of said Order to this Motion for Rehearing.

This Court based it's opinion on the case of *First Midwest vs. Pogge*, 227 Ill. Dec. 713, 293 Ill. App. 3 359, 687 NE 2d 1195, 4th District 1997. By the language in that Decision, it applies to parties who acquire an interest in

the property subsequent to the filing of the lawsuit if they have actual knowledge of the lawsuit. We submit that by its own terms that case cannot control the outcome of this case because the interest of Stephen was acquired before the filing of the lawsuit by the executor to sell the real estate, not subsequent thereto as the Pogge cases requires to have application. See page 717 of the Illinois Decision Report of that case. It simply holds that *subsequent* parties with actual notice of pending proceedings affecting their rights to that property are bound by those proceedings to the same extent as if they had constructive notice under Sec. 2-1901. No where in that case does it state the parties who acquired their interest prior to the proceeding are bound by the proceeding.

In this case the contract was entered into on November 1, 1995. The Petition in question was filed on January 12, 1996, and the Order thereon was entered February 20, 1997 and filed on June 26, 1997. Stephen was not a person who acquired an interest in the property subsequent to the proceeding and therefore the Pogge case is by its own terms not authority for the Court's opinion holding that Stephens was bound by the Order of June 26, 1997 because he had actual knowledge of the proceeding.

Therefore, when subsequent proceedings in January, 2002, occurred in the record in this case, the Trial Court had jurisdiction of the parties and subject matter. This Court should reconsider its opinion accordingly. This case was not finally decided by the Order entered on June 26, 1997 by the Trial Court as this Court held its opinion.

II

THAT THE COURT'S ALLUSION TO THE ARGUMENT BY HUCKABA THAT RALPH D. GLENN AND GLENN & LOGUE REPRESENTED ROBERT B. COCHONOUR AT THE SAME TIME HE WAS A JUDGE PRESIDING OVER THIS CASE, AND FURTHER THE HOLDING BY THE COURT IN IT'S OPINION THAT THAT ORDER ENTERED ON JANUARY 30, 2002 WAS NOT A FINAL APPEALABLE ORDER, BECAUSE THERE WERE ISSUES IN THE CASE STILL TO BE RESOLVED IS IN CONTRADICTION TO THE FOLLOWING LEGAL AUTHORITY:

We cite the case of *Eich vs. Czervonko*, 330 Ill. 455 (1928). The facts of that case were similar to this case. Plaintiff filed a Complaint to specifically enforce a contract for sale of real estate. The Court entered a judgment granting the relief requested. No appeal was taken. The master executed a deed to the plaintiff who subsequently sold it who conveyed it to others. The defendant sued out a writ of error after the deed was executed which was granted by the Supreme Court. The Supreme Court reversed the judgment and the defendant attempted to register the title in his name by filing a complaint under the Torrens Act. Judgment was entered against him and he appealed.

The holding in that case, which is applicable to this case, is found commencing on page 459:

> "A final decree is one which fully decides and finally disposes of the merits of the case though incidental matters may be reserved for consideration. A decree is final though as an incident to the relief granted it directs a reference to a master to state an account where an account is to be settled between the parties, and the rules and principles

on which the account is to be made are fixed by the decree. (*Gray v. Ames*, 220 Ill. 251; *Allison v. Drake*, 145 id. 500; *Hunter v. Hunter*, 100 id. 519; *Myers v. Manny*, 63 id. 211.) The alternative provision in the decree for execution of the deed by the master in chancery in case of failure of the defendant to comply with the decree for specific performance does not render the decree interlocutory. (*Neidhardt v. Frank*, 325 Ill. 596; *Johnson v. Northern Trust Co.*, 265 id. 263.) Cases cited by counsel for the appellant recognize this rule. The fact that the decree retained jurisdiction of the case did not render it interlocutory. It finally disposed of the right of Eva Harris to have specific performance of the contract. A deed was executed in accordance therewith by the master in chancery and possession surrendered by Eich. The decree was final. It follows, therefore, that the appellant's contention that the transfers made to Annie Meyer and by her through *mesne* conveyances to the appellees were made *pendente lite* cannot be sustained. By the entry of the final decree, which was not appealed from, *the case was closed. There was nothing pending.* (emphasis supplied) *Lis pendens* ends with the entry of a final decree under such circumstances. *(Chicago and Northwestern Railway Co. vs. Garrett*, 239 Ill. 297; *Hammond v. People*, 178 id. 503; *Lambert v. Livingston*, 131 id. 161; *Hannas v. Hannas*, 110 id. 53; *Wadhams v. Gay*, 73 id. 415; Bennett on Lis Pendens, 124.) The writ of error afterwards sued out of this court to review the decree of the circuit court was a new suit. *Thompson v. Davis*, 297 Ill. II; *Hopkins v. Patton*, 257 id. 246."

We submit that as the Court said at page 459, "The fact that the decree retained jurisdiction of the cause did not render it interlocutory. It finally disposed of the right of Eva Harris to have specific performance of the contract . . . The decree was final . . . by the entry of the final decree, which was not appealed from, the case was closed. There was nothing pending."

We submit that the decree entered on January 22, 2002 that was filed on January 30, 2002 was final. It determined that Terry Stephen was entitled to have specific performance of the contract. It was not appealed. The fact that a subsequent Petition was filed by him on September 20, 2002 to enforce the Order signed on January 22, 2002 did not change the finality of the Order.

As the Illinois Supreme Court said in the *Eich Case*, "The case was closed. There was nothing pending." If the case was closed and there was nothing pending, then none of the issues raised after January 22, 2002 were pending before Judge Cochonour. When Stephen filed his "Petition for Representative to Complete Contract on September 20, 2002, Cochonour was no longer a Circuit Judge. Nothing in this case was set before him after he signed the Order on January 22, 2002 which was filed on January 30, 2002.

III

EQUAL PROTECTION OF LAW AND UNREASONABLE

CLASSIFICATION QUESTIONS

Stephen submits that the Court's opinion deprives him of his property without due process of law and further denies him the equal protection of law guaranteed to him by the U.S. Constitution, the 14th Amendment and the Illinois Constitution, Article I, Section 2 for reason that

the Court in it's opinion has held that Stephen lost his property right as a contract buyer with actual knowledge of the proceeding although he was never joined as a party defendant to the proceeding. A contract buyer with constructive knowledge under the Lis Pendens Act could not lose his interest without being joined as a party defendant to that proceeding. That the rule announced by the Court in this cause, we submit, is arbitrary and results in unreasonable classification between contract buyers of property with actual knowledge of the proceeding and contract buyers of property with constructive knowledge of the proceeding.

LEGAL AUTHORITIES

Equal Protection of the Laws, Ill. Law & Practice, Vol. 11A - Constitutional Law, Sec. 411, 413, 414, 432 and the cases cited therein.

Stanley vs. Illinois, 1972, 92 S. Ct. 1208, 405 US 645, 31 L. Ed. 551

DUE PROCESS OF LAW: Ill. Law & Practice, Vol. 11A, Constitutional Law, Sec. 451, 452, 453, 454, 457 and the cases cited therein.

IV

SUPPLEMENT TO THE RECORD NEEDED

The appellant, Huckaba, did not file a report of proceedings of the hearing in the Trial Court which resulted in the Order entered January 22, 2002 and filed on January 30, 2002, even though Appellant's Attorney stated in his Docketing Statement that he was going to file it. If he had filed it, many of the questions raised in the Court's opinion would have been answered. Stephen stands ready to

supplement the record in this case by filing same if the Court would grant him leave to do so.

V

PROBATE LAW WILL BE ADVERSELY AFFECTED

The Court's opinion, in effect, nullifies the provisions of 755 ILCS 5/20-15, "If a representative sells a decedent's real estate under a Power of Sale in a Will, it is valid regardless of the possibility that the Will is subsequently set aside.

The Court's opinion further nullifies 755 ILCS 5/28-8(i), "Powers of independent representative to sell real estate" and 755 ILCS 5/28-9, "protection of persons dealing with an independent representative."

We submit those statutes effectively prevent the result reached by the Court in this appeal. If the Court's opinion is correct, no representative could negotiate for a valid sale by contract and the buyer be assured of getting good title and the entire purpose of those statutes would be destroyed.

CONCLUSION

The basis of the Court's decision was that the Order entered on June 26, 1997 in a 755 ILCS 5/20-4 proceeding to sell real estate to pay debts to which Stephen was not a party, deprived him of his interest in the real estate because he had actual notice thereof even though his interest pre-dated the Petition to Sell Real Estate. That 755 ILCS 5/20-5 required he be joined as a party defendant to that proceeding. He signed the contract on November 1, 1995. The Petition was filed on January 12, 1996 and the Order was entered on June 26, 1997. We submit that

under the authorities cited herein, contrary to the Court's opinion, he did not lose his interest as a result of that Order being entered. We submit, therefore, that the subsequent orders entered by the Trial Court on January 30, 2002 and January 12, 2005 were valid enforceable orders and should be enforced by this Court as prayed for in the briefs filed by Stephen.

WHEREFORE, Stephen prays that this Court will grant him a rehearing and upon said rehearing will amend its Order and grant him the relief prayed for in his Brief.

Respectfully Submitted,

TERRY STEPHEN, APPELLEE AND
CROSS-APPELLANT,

By _____

/s/ RALPH D. GLENN of GLENN & LOGUE
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MATTOON, IL 61938
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IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT
CLARK COUNTY, MARSHALL, ILLINOIS

IN THE MA'TER OF	)	
ROBERT POWERS, JR., deceased,	)	
	)	
VIRGINIIA ROSE HUCIKABA and	)	
ROBERT G. POWERS,	)	
Petitioners,	)	
vs.	)	No. 95-P-47
	)	
RALPH N. POWERS, individually	)	
and as executor of the Estate	)	
of Robert Powers, Jr.,	)	
Deceased, and NELLIE ROBERTS,	)	
Defendants.	)	

This cause coming on to be heard on the Petition to Sell Real Estate, Ralph N. Powers, Executor, present in person by counsel, Petitioners present by counsel, the Court having heard arguments of counsel, having examined the pleadings of the parties and being fully advised in the premises finds as follows:

1. That the court has jurisdiction of the parties and the subject matter.

2. That it is not in the best interest of the estate to complete the contract to sell the real estate.

3. That this matter is brought pursuant to Section 20-4 of the Probate Act of the State of Illinois.

WHEREFORE, it is ordered that the Executor of the Estate of Robert G. Powers does not have leave of court

and shall not complete the contract to sell real estate dated January 12, 1996 with prospective buyer, Terry Stephen.

Dated: February 20, 1997 ENTER:_____
/s/ Judge

Approved As To Form:

_____
/s/ Joseph R. Schroeder, Attorney for Defendants

_____
/s/ O. Anthony Siemer, Attorney for Petitioners

State of Illinois
Fourth Judicial District

In the APPELLATE COURT sitting at SPRINGFIELD, within and for the State of Illinois.

Present: Honorable ROBERT W. COOK, Judge Honorable ROBERT J. STEIGMANN, Judge Honorable JOHN T. MCCULLOOGH, Judge

BE IT REMEMBERED, that on the 9th day of November, 2005, the final judgment of said Appellate Court was entered of record as follows:

TERRY STEPHEN,	)	
Plaintiff-Appellee and	)	
Cross-Appellant,	)	General No:
	)	4-05-0073
VIRGINIA ROSE HUCKABA, as	)	
Independent Administratrix of the	)	Appeal from
Estate of ROBERT POWERS, JR.,	)	the Circuit
Deceased,	)	Court of Clark
Defendant-Appellant and	)	County
Cross-Appellee,	)	
and	)	01CH12
THE ESTATE OF ROBERT	)	95P47
POWERS, JR., a/k/a	)	
ROBERT JUNIOR POWERS,	)	
Deceased.	)	

It is the decision of this court that the order on appeal from the circuit court be REVERSED and the cause be REMANDED WITH DIRECTIONS to the Circuit Court for the Fifth Judicial Circuit Clark County, for such other proceedings as required by the opinion of this court, a copy of which is attached hereto.

Costs, if any, to be taxed in accordance with the law.

As Clerk of the Illinois Appellate Court for the Fourth Judicial District and keeper of the records, files and Seal thereof, I certify that the foregoing is a true statement of the final order of said court in the above entitled cause, of record in my office.

IN WITNESS WHEREOF, I have set my hand and affixed the Seal of the Illinois Appellate Court for the Fourth Judicial District, this 2nd day , of May, 2006.

/s/ Clerk of the Appellate Court for the Fourth Judicial District

STATUTES INVOLVED

755 ILCS 5/20-4. Sale or mortgage of decedent's real estate.

(a) By leave of court and upon such terms as the court directs, a representative of a decedent's estate may sell or mortgage any real estate or interest therein to which the decedent had claim or title, including the oil, gas, coal or other mineral interest therein, when it is necessary for the proper administration of the decedent's estate.

(b) Real estate specifically bequeathed or directed by the testator not to be sold may not be sold or mortgaged unless necessary for the payment of claims, expenses of administration or estate or inheritance taxes or the proper distribution of the estate.

755 ILCS 5/20-5. Procedure for sale or mortgage of real estate

(a) Before selling or mortgaging real estate, the representative shall file a petition in the court which issued his letters setting forth the facts and circumstances upon which it is founded, a description of the real estate or interest therein, or of the oil, gas, coal or other mineral interest involved, the approximate value thereof, the interest of the ward or decedent therein, and the nature and extent of all liens upon and other interests, if any, in the real estate, or in the oil, gas, coal or other mineral interest so far as they may be known to the petitioner. A copy of the proposed mortgage or of the proposed contract for sale of the real estate, if any, shall be attached to the petition.

(b) All persons holding liens against or having an interest in the real estate, or in the oil, gas, coal or other mineral interest or in any part thereof, described in the petition, in possession or otherwise, whose rights are sought to be affected by the order, except the ward shall be made parties defendant.

(c) Upon the filing of the petition, process shall be issued, served and returned as in other civil cases.

735 ILCS 5/2-1901. Lis pendens—Operative date of notice

§ 2-1901. Lis Pendens—Operative date of notice. Except as otherwise provided in Section 15-1503, every condemnation proceeding, proceeding to sell real estate of decedent to pay debts, or other action seeking equitable relief, affecting or involving real property shall, from the time of the filing in the office of the recorder in the county where the real estate is located, of a notice signed by any party to the action or his attorney of record or attorney in fact, on his or her behalf, setting forth the title of the action, the parties to it, the court where it was brought and a description of the real estate, be constructive notice to every person subsequently acquiring an interest in or a lien on the property affected thereby, and every such person and every person acquiring an interest or lien as above stated, not in possession of the property and whose interest or lien is not shown of record at the time of filing such notice, shall, for the purposes of this Section, be deemed a subsequent purchaser and shall be bound by the proceedings to the same extent and in the same manner as if he or she were a party thereto. If in any such action plaintiff or petitioner neglects or fails for the period of 6 months after the filing of the complaint or petition to cause notice to be given to the defendant or defendants, either by service of summons or publication as required by law, then such

notice shall cease to be such constructive notice until service of summons or publication as required by law is had.

14th Amendment to the United States Constitution, Section 1

AMENDMENT XIV

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.